Filed 8/27/15 P. v. Colvard CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. CURTIS DEANTOINE COLVARD, Defendant and Appellant.	C074450 (Super. Ct. No. 13F00864)

After officers attempted to pull over a Toyota Yaris driven by codefendant Matthew Hayden, Hayden sped off. A high speed chase ensued, and when it ended defendant Curtis Deantoine Colvard fled on foot, shedding a loaded revolver in the process.[1] An information charged defendant with possession of a sawed-off shotgun and possession of a firearm by a convicted felon. (Pen. Code, §§ 33215, 29800,

[1] According to defendant, the correct spelling of his middle name is "Deanton." It is spelled "Deantoine" throughout the record on appeal, including on the abstract of judgment.

subd. (a)(1).)[2] A jury found defendant guilty on both counts. The trial court sentenced defendant to six years four months in state prison. On appeal, defendant alleges prosecutorial misconduct, ineffective assistance of counsel, instructional error, sentencing error, and cumulative error. We shall affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

The Chase and Its Aftermath

In February 2013 California Highway Patrol Officer Frank Archuleta and Sacramento County Sheriff's Detective Lizardo Guzman were patrolling a high-crime area in the early evening. The duo sat in an unmarked truck and wore tactical raid gear specifying their respective ranks in yellow letters. As they pulled into a motel parking lot, Guzman saw a Toyota Yaris pulling out. The cars passed one another slowly, about two feet apart.

Defendant sat in the right front passenger seat, garbed in a black puffy jacket with a red shirt underneath. Hayden, the driver, wore a white T-shirt. The officers turned their truck around and got behind the Toyota so they could conduct a records check of the license plate.

As the officers caught up to the Toyota, it ran a red light, almost striking a pedestrian. Guzman decided to make a traffic stop and activated his lights and siren. Initially, Hayden began to slow down and pull the Toyota toward the shoulder, but he suddenly sped away toward the freeway, with Guzman following.

The Toyota entered the freeway going between 80 and 90 miles per hour and crossed four lanes of traffic. Freeway traffic braked as the Toyota again crossed four lanes to exit the freeway. As Hayden exited the freeway, the Toyota collided with

---

[2] All further statutory references are to the Penal Code unless otherwise designated.

cement construction barricades in the middle of the offramp. The pursuit lasted 20 to 30 seconds and covered two and a half miles of the freeway.

As the car left the freeway, Guzman saw defendant throwing orange prescription-type bottles out the window. After the Toyota crashed into the barricades, defendant fled from the car. He was now wearing a black sweater. While running away from the officers, defendant threw a loaded .357 Magnum revolver to the ground in front of the Toyota. Hayden also got out of the car but was halted by Guzman and a fractured ankle.

Guzman requested backup, and when reinforcements arrived a perimeter was established and two canine officers began to search for defendant. One of the police dogs found defendant hiding close to the crashed Toyota and also located a black sweatshirt with defendant's cell phone inside the pocket.

Officers found a green duffel bag in the hatchback of the Toyota. Inside the duffel bag was a loaded sawed-off shotgun, ammunition for the shotgun, ammunition for a .357 Magnum, and a single round for an AK-47. On the floor of the car officers discovered the black jacket defendant had been wearing with two speed loaders full of .357 ammunition in a pocket. Officers also found orange-colored prescription bottles like the ones defendant had thrown during the chase; 62-1/2 pills, later ascertained to be methamphetamine; a digital scale; small Ziploc baggies; and a loaded nine-millimeter Ruger semiautomatic handgun with the serial numbers removed. When officers found Hayden, he was wearing a holster that fit the nine-millimeter Ruger, and he had ammunition for the weapon in his pocket.

Defense

Defendant testified at trial. He denied owning any of the guns, ammunition, drugs, the duffel bag, or the jacket.[3] He admitted owning the sweatshirt with his cell

---

[3] Defendant stated the black jacket was hanging on the seat when he entered the car.

phone in the pocket. Defendant testified he called Hayden for a ride from the motel, where he had been watching the Super Bowl. He had spent the night with a woman who was not his wife. When defendant heard the siren, he asked Hayden to pull over. As Hayden sped away, he reached over and began throwing the pills and revolver onto defendant's lap. Defendant threw the pills out the window and the nine-millimeter revolver onto the floor.

When the Toyota crashed, the .357 handgun was on his lap. When he got out of the car, defendant threw the gun onto the ground and ran. Defendant ran from the officers because he was on parole and because he wanted to return home to his wife and children.

Hayden did not testify at trial. Through counsel, he admitted ownership of the nine-millimeter Ruger but denied ownership of the sawed-off shotgun, green duffel bag, or the .357 Magnum revolver.

Information, Verdict, and Sentencing

A second amended information charged defendant with possession of an illegal weapon, a sawed-off shotgun, and being a felon in possession of a firearm, a loaded .357 Magnum revolver. The information also alleged defendant was a felon based on his 2005 conviction for assault with a deadly weapon. (§ 245, subd. (a)(1).) In addition, the information alleged defendant had suffered two prior felony convictions, intimidating a witness and domestic violence, for which he served separate terms in prison and did not remain free of prison custody for a period of five years subsequent to the conclusion of said terms for those two convictions. (§§ 136.1, 273.5, subd. (a), 667.5, subd. (b).)

Defendant entered a not guilty plea and denied the enhancement allegations. Following a jury trial, the jury found defendant guilty on both counts. Defendant admitted the prior conviction enhancements.

The trial court sentenced defendant to six years four months in state prison: the middle term of two years for possession of a sawed-off shotgun, doubled for the prior

strike conviction, plus a consecutive one year four months, one-third the middle term of eight months on the charge of being a felon in possession of a weapon, doubled because of the prior strike conviction, plus one year for the prior prison term enhancement. Defendant filed a timely notice of appeal.

DISCUSSION

PROSECUTORIAL MISCONDUCT

Defendant argues the prosecutor engaged in misconduct in three respects: eliciting gang information, implying defendant was with a prostitute at the motel, and mischaracterizing defendant's testimony about the Super Bowl. According to defendant: "Rather than tried on the facts, [defendant] was tried as a gang member, located in a high crime area 'ridden with prostitution,' in a hotel room with a woman other than his wife, and a purported liar regarding his purpose for being there to watch the Super Bowl." The cumulative effect of this misconduct violated defendant's right to due process and a fair trial.

A prosecutor's conduct violates the federal Constitution when it comprises a pattern of conduct so egregious that it infects the trial with such unfairness as to deny the defendant due process. Prosecutorial conduct that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury. (*People v. Bryant, Smith and Wheeler* (2014) 60 Cal.4th 335, 427 (*Bryant*); *People v. Samayoa* (1997) 15 Cal.4th 795, 841 (*Samayoa*).) It is misconduct for a prosecutor to misstate the law during argument, misstate or mischaracterize the evidence, or assert facts not in evidence. (*People v. Whalen* (2013) 56 Cal.4th 1, 77; *People v. Davis* (2005) 36 Cal.4th 510, 550; *People v. Cunningham* (2001) 25 Cal.4th 926, 1026.) A prosecutor commits misconduct by referring to matters not in evidence unless they are matters of common knowledge or drawn from common experience. (*Cunningham*, at p. 1026.)

When prosecutorial misconduct is based on the prosecutor's comments in front of the jury, we consider whether there is a reasonable likelihood the jury construed or applied any of the complained-of remarks in an objectionable fashion. (*Bryant, supra*, 60 Cal.4th at p. 427.) We review the challenged statements within the context of the record and argument as a whole. (*People v. Cole* (2004) 33 Cal.4th 1158, 1203.) In addition, we do not lightly infer that the jury drew the most, rather than the least, damaging meaning from the prosecution's statements. (*People v. Shazier* (2014) 60 Cal.4th 109, 144.)

As a general rule, a defendant must object to the prosecutor's misconduct and request an admonition when the misconduct occurs. (*Samayoa, supra*, 15 Cal.4th at p. 841.) The defendant's failure to object or request an admonition is excused if it either would have been futile or would not have cured the harm caused by the misconduct. (*People v. Alfaro* (2007) 41 Cal.4th 1277, 1328.)

The People argue defendant, by failing to object or by acquiescing to the court's attempts to mitigate the alleged misconduct, forfeited any claims of prosecutorial misconduct. However, defendant also alleges defense counsel's actions constitute ineffective assistance of counsel. Therefore, we address his claims on the merits.

Gang Information

Prior to trial, defendant moved in limine, requesting that the trial court prohibit any mention during trial that prior to the traffic stop, officers suspected defendant might have gang ties. Specifically, defendant requested no mention be made that the two officers were assigned to the "Gang Suppression Unit" or that they had been interested in defendant because he was wearing a red shirt. At the hearing on the motion, the prosecutor stated she would admonish the officers not to testify that they were patrolling the area because of gang concerns when they arrested defendant. The trial court also requested that the officers not refer to the gang task force. The prosecutor agreed. In

addition, the prosecutor agreed not to place emphasis on the color red because of its gang associations.

At trial, Officer Archuleta testified that he was on assignment to the Sacramento Sheriff's Department as part of an "impact team." When the prosecutor asked if he had a specific assignment, Archuleta responded he had and that he received specialized training for that assignment. The prosecutor inquired as to the type of training he had relative to the job he was currently doing; Archuleta responded that he was on a team that investigated gang members and the crimes they commit.

The prosecutor asked, "And is it fair to say you also do additional types of investigations or whatever pops up in front of you?" Archuleta answered yes and testified he had been trained to handle everything from DUI [driving under the influence] crashes and arrests to narcotics and guns. He also stated they pulled Hayden over because of a Vehicle Code violation: failure to stop at a red light and the near collision with a pedestrian. Archuleta testified defendant wore a black jacket with a red shirt underneath.

During the following lunch break, defense counsel stated she believed the prosecutor had violated the court's order to not mention anything gang related. Defense counsel had not objected at the time to avoid drawing further attention to the testimony, making a tactical decision not to say anything. She requested that the prosecutor caution Guzman prior to his testimony. Defense counsel stated: "At this point, I just would be asking for no -- maybe if Miss Eixenberger [the prosecutor] could remind him not to say anything further. And then, also, specifically with the other detective that's coming in later, if we could do the admonition at the beginning. I feel that the cure would be just not to draw attention to it. Because there's an issue that was not present at the beginning of the trial, when I was asking for the motions in limines [*sic*], in terms of the jacket and -- the black jacket. The officer now is testifying to something that he didn't write in his report; that we just learned this morning. And so --[.]" The court asked,

"That being what?" Defense counsel replied: "Being that he saw [defendant] wearing the jacket while he was driving. That's nowhere mentioned in the police report. It was just mentioned in the police report that they had pulled over this car because they saw the color red.

"And so I didn't want to place emphasis on this being a gang case, because it's not; that being the color red. I'm worried that -- coupled with they are on the gang unit and [defendant] was wearing red -- that a juror may be able to put one and one together, saying that they possibly -- one or both of them may be in a gang.

"So I'm just -- I've thought it through. And I think it can be cured, but I just want the other detective to be told." The court agreed.

The prosecutor responded: "They [the officers] were both told to not speak about [d]efendant . . . and his colors that he was wearing and them believing that he might be in a gang.

"I don't believe it's a violation for him to talk about what his duties are. He indicated that he does multiple different kinds of stops and that whatever sort of pops up in front of him is what he deals with. In fact, in this incident there was a Vehicle Code violation right in front of them and that's why they stopped the vehicle.

"And he has additional training above and beyond just a patrol officer, and I believe he can testify about that. There's -- he hasn't said anything about [d]efendant . . . being in a gang or the red drawing his attention because he was in a gang." The court agreed with this assessment.

However, the court instructed the prosecutor to admonish her next witness consistent with the court's prior order, and the following exchange occurred. "The Court: . . . I know that when you were asking him questions just about his duties, the part of the task force he's in, the gang stuff came up and then it just kind of -- street -- street patrol. So I understand that.

"Do admonish -- and I really didn't hear much; that the car was stopped because there was some red in the car. It was basically a Vehicle Code violation. The car took off. So I would admonish your next witness not to say anything. But what I heard was relatively harmless.

"If, Miss Zettel [defense counsel], you feel that there may be some hint of gang . . . affiliation, I think the best way to handle that with this witness is to just confirm with the witness. And it may be better done through . . . maybe the prosecution. 'This wasn't a gang-related case. And the reason for the stop was a Vehicle Code violation; is that correct?'

"Ms. Zettel: That's fine.

"The Court: And not even flag the gang stuff.

"Ms. Eixenberger [prosecutor]: I think the issue, though, is that part of the stop was because they thought he was in a gang. But I've admonished them to not say that that's why they stopped; that they stopped because of the Vehicle Code violation.

"The Court: Then it might be best just to not say any more and just keep any gang training out of your next witness' repertoire, just because it's not relevant to this case. Okay?"

Detective Guzman testified that he was in a "specialized unit." Guzman did not use the word "gang" during his testimony.

During her cross-examination of defendant, the prosecutor asked: "[W]hat were you wearing?

"[Defendant]: Uh, my black-hooded sweater and jeans.

"[The Prosecutor]: What did you have under your black sweatshirt?

"[Defendant]: I had a red thermal shirt, and I had a white teeshirt over that.

"[The Prosecutor]: Blue jeans?

"[Defendant]: Yes, ma'am.

"[The Prosecutor]: What kind of shoes were you wearing?

"[Defendant]: Some Air Maxes.

"[The Prosecutor]: What color were they?

"[Defendant]: Red."

Defendant asserts the prosecutor "would not stop asking Officer Archuleta about his assignment until he referenced gang investigations." In addition, defendant argues the prosecution's questions regarding defendant's clothing "were clearly intended to impeach [defendant] by causing the jury to believe that he may be a gang member," and the jury likely "used the well-known fact that red is associated with gang membership to cast [defendant] in an unfair light while considering his testimony."

Our review of the record does not support defendant's interpretation of events. Officer Archuleta stated only once, briefly and without elaboration, that part of his job involved investigating gang crimes. He elaborated that his duties involved everything from DUI accidents and arrests to narcotics and guns. Officer Archuleta testified that he pulled Hayden and defendant over because of a Vehicle Code violation: Hayden's failure to stop at a red light and the near collision with a pedestrian. The evidence before the jury supported the conclusion that Officer Archuleta stopped Hayden because of his reckless driving, and the pursuit and ultimate arrests stemmed from the traffic stop. Nothing before the jury supported any supposition of gang-related activity.

As for the references to red apparel, nothing before the jury allowed it to infer the color red denoted gang affiliation on defendant's part. Defendant points to no evidence presented at trial that mentions the color red as a gang color. Instead, defendant posits that the jury "used the well-known fact" that red is associated with gangs. However, the jury was instructed to consider only the evidence admitted during the trial in reaching its verdict. We presume the jury followed the court's instruction. (*People v. Harris* (1994) 9 Cal.4th 407, 426.)

Prostitution Reference

During his testimony, Detective Guzman stated that the area around the motel in question was a high-crime area known for prostitution and drugs. Initially, defendant, during his cross-examination by Hayden's counsel, denied he had stayed at the motel with a woman. During cross-examination by the prosecutor, defendant admitted that his wife was not with him for the Super Bowl viewing at the motel. Instead, he spent the night with a woman named Susan, whom he had met a few hours before.

The prosecutor asked: "You know [the motel] is [in] a high crime area, correct?

"[Defendant]: I do not.

"[The Prosecutor]: You did not know that?

"[Defendant]: No.

"[The Prosecutor]: You don't know that prostitutes hang out there?

"[Defendant]: I'm from Michigan.

"[The Prosecutor]: How long have you lived in Sacramento?

"[Defendant]: I've been here for a minute.

"[The Prosecutor]: How long is 'a minute'?

"[Defendant]: Uh, ten years.

"[The Prosecutor]: You know that prostitutes hang out at that hotel?

"[Defendant]: I do not." During closing argument, the prosecutor noted that defendant "is a convicted felon with a firearm . . . in that car. And he also is in an area that you heard was a high crime area, saturated with drugs, guns and prostitutes. He had no business being in that area or having a gun that day."

Defendant argues the references to prostitution amounted to misconduct and served no purpose other than to cause the jury to view defendant with disgust. However, these remarks were only incidental to defendant's initial denial and subsequent admission that he spent the night at the motel with someone other than his wife, a lack of veracity that undermined his credibility. Viewed in context, the prosecutor's remarks reminded

the jury of defendant's lack of honesty. Any disgust was a product of defendant's testimony rather than the prosecutor's argument. We find no misconduct.

Super Bowl Reference

The testimony surrounding the Super Bowl is rather disjointed and confusing. Defendant, testifying on his own behalf, explained the reason Hayden picked him up at the motel was because he had been there to watch the Super Bowl. During cross-examination, the prosecutor asked defendant if he was at the motel on February 4, 2013. Defendant answered in the affirmative. The prosecutor than asked: "What time did you get there?" Defendant replied, "I got there the day before to watch the Super Bowl." The prosecutor questioned, "So you got there on the 3rd?" and defendant answered, "Yes, ma'am."

The prosecutor asked what time the game started and defendant responded, "I think it started about 5:00 or 6:00 o'clock." However, the prosecutor pointed out that defendant left at 7:00 o'clock and asked, "So you didn't watch the game?" Defendant responded that he watched some of the game. When asked who played in the Super Bowl, defendant answered, "San Francisco and somebody." The prosecutor asked if defendant's friends also stayed overnight at the motel, and defendant testified he did not know because he stayed in another room. Subsequently, the prosecutor asked: "So on February 4th, you . . . left during the middle of the Super Bowl, correct?" Defendant said, "Yes, ma'am." The prosecutor further questioned, "And where were you going?" Defendant replied, "I was going home."

This testimony created confusion as to which day defendant watched the Super Bowl, February 3 or February 4. The court took judicial notice of the fact that February 4, 2013, was a Monday. During closing argument, the prosecutor argued defendant lied about the Super Bowl because it did not take place on February 4, 2013. Defense counsel argued defendant was not a big football fan, so his answers about the

game were not significant. At sentencing, the court mentioned defendant had not been truthful when he testified about viewing the Super Bowl on a Monday.

From the record, the parties and the court were confused as to exactly when defendant claimed to have watched the Super Bowl. The People concede the prosecution may have misunderstood defendant's testimony. Defendant contends "[i]t is immaterial if the prosecutor made an honest mistake and misunderstood [defendant's] testimony" but argues in fact that the prosecutor misrepresented defendant's testimony and such misrepresentations have a major impact on the jury. The misunderstanding resulted in defendant's being made out to be a liar during the prosecutor's closing argument.

We cannot find that the confusion about whether or not defendant watched the Super Bowl the night of his arrest had a "major impact on the jury." Defendant's own testimony called his credibility into question. He denied spending the evening with someone other than his wife, then admitted it. Defendant claimed not to know the area in which the motel sits, claiming he had only been a resident of Sacramento for "a minute." A minute, defendant acknowledged, was 10 years. His admission to prior felony convictions for assault with a deadly weapon, domestic violence, and witness intimidation wreaked far more havoc on his veracity than any question as to whether or not he watched the Super Bowl. There was no prejudicial prosecutorial misconduct. (See *People v. Osband* (1996) 13 Cal.4th 622, 706-708.)

INEFFECTIVE ASSISTANCE OF COUNSEL

In addition to the alleged ineffective assistance claims discussed *ante*, defendant contends defense counsel failed to object to highly inflammatory testimony from Detective Guzman.

To establish ineffective assistance of counsel, defendant must show counsel's performance was deficient, falling below an objective standard of reasonableness under prevailing norms, and the deficient performance prejudiced defendant. (*People v. Ledesma* (1987) 43 Cal.3d 171, 216-218.) We accord trial counsel's tactical decisions

substantial deference and do not second-guess counsel's reasonable tactical decisions. (*People v. Maldonado* (2009) 172 Cal.App.4th 89, 97.)

We will not reverse on appeal if the record does not affirmatively show why counsel failed to object and the circumstances suggest counsel had a valid tactical reason for not objecting. If the record sheds no light on why counsel acted or failed to act, we affirm unless there could be no satisfactory explanation for the act or omission. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267.)

During defense counsel's cross-examination of Detective Guzman, she asked: "I'm also going to show you what's been marked as People's Exhibit 12. [¶] Again, is this a picture of what you were referring to in terms of laying out evidence for other agencies to see?" Detective Guzman answered: "This picture was taken to forward over to our robbery division. The detective in me says that people with gloves, black bandannas, simulated handguns, hoodies -- and this is like a fedora type of -- beanie type of hat -- is consistent with that, with what people might use or do use to rob people or businesses. [¶] So sharing the intelligence of who I arrested and what was found, I want to make sure that if there's anything here, may not be relevant to any of the charges that I have against both of these defendants, may be relevant in an open, unsolved case that they were currently working. This is what that photograph was for." Defense counsel responded, "Thank you. [¶] Just to clarify, neither one of these gentlemen was arrested for any robbery, correct?" Detective Guzman replied, "Correct."

Defendant faults defense counsel for failing to immediately object to the detective's "rambling, inflammatory, answer as nonresponsive" and to request a motion to strike the answer. The evidence, defendant contends, was highly inflammatory, conjuring up images of defendant and Hayden as out-of-control robbers.

In response to the testimony, defense counsel quickly clarified that neither Hayden's nor defendant's arrest was connected with a robbery. Defense counsel made a tactical decision to immediately defuse the testimony and to avoid calling further

attention to it by objecting or making a motion to strike. We accord such tactical decisions substantial deference and will not second-guess defense counsel in the present case.

INSTRUCTIONAL ERROR

Defendant was charged with being a felon in possession of a firearm. He argues that there were three firearms involved in the incident and the trial court erred in failing to give a unanimity instruction.

The trial court must instruct, even in the absence of a request, on the general principles of law relevant to the issues raised by the evidence. These general principles refer to those principles closely and openly connected with the facts before the court and necessary to the jury's understanding of the case. (*People v. Sedeno* (1974) 10 Cal.3d 703, 715.) We assess the jury instructions as a whole to determine whether there is a reasonable likelihood the jury applied the instruction in a way that violated defendant's constitutional rights. (*People v. Campos* (2007) 156 Cal.App.4th 1228, 1237.) We review the instructions de novo. (*People v. Hamilton* (2009) 45 Cal.4th 863, 948.)

If the evidence reveals more than one unlawful act that could support a single charged offense, the prosecution must either elect which act to rely upon, or the trial court must instruct sua sponte that the jury must unanimously agree on which act constituted the crime. A unanimity instruction ensures that a defendant will not be convicted when there is no single offense which all the jurors agreed the defendant committed. (*People v. Norman* (2007) 157 Cal.App.4th 460, 464-465.)

In contrast, where the evidence shows only a single discrete crime but leaves room for disagreement as to exactly how that crime was committed or what the defendant's precise role was, unanimity is not required. The jury must agree on a particular crime but not on the particular theory of the crime. (*People v. Russo* (2001) 25 Cal.4th 1124, 1132-1134.)

Defendant argues that three different firearms are at issue in the present case: a .357 Magnum handgun, a nine-millimeter handgun, and a sawed-off shotgun. The court erred, defendant contends, in not informing the jury it had to be unanimous as to which firearm defendant unlawfully possessed.

The jury instruction stated the jury must decide if "[t]he defendant possessed a firearm" and if "[t]he defendant knew that he possessed the firearm." The verdict form states the jury found defendant guilty of section 29800, subdivision (a)(1), being a convicted felon in possession of a firearm. According to defendant, which firearm supported the verdict was ambiguous and the court erred in not giving a unanimity instruction.

However, defendant acknowledges that the second amended information, which was read to the jury, stated defendant was charged with possession of an illegal weapon, a sawed-off shotgun, and being a convicted felon in possession of a firearm, a loaded .357 Magnum revolver. We are not persuaded by defendant's assertion that "[i]t would have been an impossible for the jurors to remember, and rely upon, the reading of the information three days prior to deliberations."

PRIOR CONVICTION ALLEGATIONS

Finally, defendant argues the trial court accepted admission of the prior conviction allegations without obtaining intelligent and voluntary waivers of the right against self-incrimination, the right to a jury trial, and the right to confrontation as required by *Boykin*/*Tahl*.[4] Defendant disputes the trial court's statement that, prior to the jury trial, defendant had waived his right to a jury trial on whether or not he had suffered the alleged prior convictions.

---

[4] *Boykin v. Alabama* (1969) 395 U.S. 238, 242-244 [23 L.Ed.2d 274] (*Boykin*); *In re Tahl* (1969) 1 Cal.3d 122 (*Tahl*).

Background

At the beginning of trial defendant moved to bifurcate the prior prison term allegations and the prior convictions for serious felonies:

"The Court: And there's two bifurcations. One is a prison prior and one is a prior -- a strike prior.

"And you're asking for bifurcation of both of those?

"[Defense Counsel]: Yes.

"The Court: And unless there's a strenuous objection that the Court needs to hear, I'm going to grant that.

"[The Prosecutor]: No objection.

"The Court: Okay. That will be granted."

The parties stipulated, for purposes of the convicted felon in possession of a firearm charge, that defendant had been convicted of a felony in 2005. The stipulation was read to the jury. In addition, the trial court also found that if defendant decided to testify in his own defense, the prosecutor could use defendant's two prior convictions from 2006, intimidating a witness and domestic violence, to impeach him.

During direct examination defense counsel asked: "This was not your first time being arrested?"

"[Defendant]: No, ma'am.

"[Defense counsel]: And . . . in '05, 2005, did you plead to an assault with a deadly weapon?

"[Defendant]: Yes, ma'am.

"[Defense Counsel]: Was that weapon a gun?

"[Defendant]: No, ma'am.

"[Defense Counsel]: In 2006, did you plead to domestic violence and intimidating a witness?

"[Defendant]: Yes, ma'am."

During cross-examination, Hayden's counsel asked: "You have a history of intimidating witnesses, right?"

"[Defendant]: Uh, that was one of the charges. That was one of the charges.

"[Hayden's Counsel]: And you were convicted of that, correct?

"[Defendant]: I was. I was."

After the jury returned guilty verdicts, the court stated: "At the beginning of the trial, [defendant] waived a jury trial on the prior convictions." The court then asked: "Is [defendant] requesting a court trial on the prior convictions?" Defense counsel asked for a few minutes to explain the situation to her client. Subsequently, defense counsel stated defendant did not want a bench trial, but instead wanted to admit the prior convictions. The court confirmed defendant's waiver: "At this time, [defendant] would not like a bench trial." Defense counsel answered: "Correct." The trial court proceeded to read aloud from the second amended information and defendant admitted each prior prison term enhancement allegation.

Discussion

When a criminal defendant enters a guilty plea, the trial court is required to ensure that the plea is knowing and voluntary. As a prophylactic measure, the court must inform the defendant of the privilege against compulsory self-incrimination, the right to trial by jury, and the right to confront accusers, and the court must obtain a waiver of each. This process is necessary to make sure the defendant has a full understanding of what the plea connotes and the attendant consequences. (*People v. Cross* (2015) 61 Cal.4th 164, 179 (*Cross*); *People v. Howard* (1992) 1 Cal.4th 1132, 1179 (*Howard*); *Boykin*, *supra*, 395 U.S. at pp. 243-244; *Tahl*, *supra*, 1 Cal.3d at pp. 130-133.)

Defendant argues the trial court failed to obtain these waivers prior to imposing the enhancements based on prior convictions. According to defendant, he "admitted during his trial to being convicted of certain crimes so that the jury could evaluate his credibility. He did not admit that these 2006 convictions were felony convictions or what

statute he was convicted of violating. Nor did he admit that he served prior prison commitments. [Defendant] simply cannot have been deemed to have admitted the enhancements . . . ." The People initially disagreed, asserting defendant's admissions during trial of the substantive offense were conclusive in the subsequent trial on the priors, but at oral argument the People reconsidered and conceded the trial court erred in failing to advise defendant of his *Boykin*/*Tahl* rights and securing a waiver of those rights. The concession was appropriate.

In *In re Yurko* (1974) 10 Cal.3d 857 (*Yurko*), the Supreme Court held that the same requirements of advisement and waiver apply when a defendant admits the truth of a prior conviction allegation that subjects the defendant to increased punishment. The court explained: "Because of the significant rights at stake in obtaining an admission of the truth of allegations of prior convictions, which rights are often of the same magnitude as in the case of a plea of guilty, courts must exercise a comparable solicitude in extracting an admission of the truth of alleged prior convictions. . . . As an accused is entitled to a trial on the factual issues raised by a denial of the allegation of prior convictions, an admission of the truth of the allegation necessitates a waiver of the same constitutional rights as in the case of a plea of guilty. The lack of advice of the waivers so to be made, insofar as the record fails to demonstrate otherwise, compels a determination that the waiver was not knowingly and intelligently made." (*Id*. at p. 863.) The court concluded that *Boykin* and *Tahl* require, before a court accepts an accused's confession that he or she has suffered prior felony convictions, express and specific admonitions as to the constitutional rights waived by an admission. (*Yurko*, at p. 863.)

In *Howard*, *supra*, 1 Cal.4th 1132, the Supreme Court reaffirmed *Yurko*'s requirement of explicit admonitions and waivers. (*Howard*, at pp. 1178-1179.) The court also clarified that *Yurko* error is not reversible per se. Instead, the test for reversal is whether the record affirmatively reveals the guilty plea is voluntary and intelligent

under the totality of the circumstances. (*Howard*, at p. 1175; *People v. Mosby* (2004) 33 Cal.4th 353, 361-365 (*Mosby*).)

Most recently in *Cross*, the defendant was charged with felony infliction of corporal injury in violation of section 273.5, subdivision (a). The information further alleged the defendant had suffered a prior conviction under section 273.5. At trial, the defendant stipulated to the prior conviction. The trial court accepted the stipulation without advising the defendant of his rights or obtaining a waiver of those rights under *Boykin-Tahl*. The jury found the defendant guilty and found true the allegation that the defendant had suffered a prior conviction. In light of the conviction, the trial court sentenced the defendant to the maximum term of five years. (*Cross, supra*, 61 Cal.4th at pp. 168-169.)

The defendant appealed, arguing that because his unwarned stipulation to the prior conviction had the direct consequence of subjecting him to a longer prison term, the stipulation was invalid under *Yurko*. (*Cross, supra*, 61 Cal.4th at p. 168.) The court agreed, noting: "[O]ur case law since *Yurko* has drawn a distinction between, on one hand, 'a defendant's admission of evidentiary facts which [does] not admit every element necessary to conviction of an offense or to imposition of punishment on a charged enhancement' and, on the other, 'an admission of guilt of a criminal charge or of the truth of an enhancing allegation where nothing more [is] prerequisite to imposition of punishment except conviction of the underlying offense.' [Citation.] The requirements of *Boykin-Tahl* and *Yurko* apply to the latter type of admission but not the former." (*Cross*, at p. 171.) The court also held a defendant does not forfeit a claim that his or her waiver of those rights was not voluntary by failing to object to the lack of advisement. (*Id*. at p. 173.)

Here, defendant admitted he had been convicted of domestic violence and intimidating a witness. He did not testify that he had served a prior prison term, remained

free of prison confinement, or that his prior offense was a strike. The trial court erred in not advising defendant of his rights under *Boykin*/*Tahl* and *Yurko*.

However, we find the error harmless under *Howard* and *Mosby*. Defendant understood he had the right to a jury trial on the prior conviction allegations. He moved to bifurcate, and although the court erred in finding he waived his right to bifurcate, defendant conferred with counsel regarding bifurcation. Defendant testified during trial and had been informed of his right to confront witnesses and of the privilege against self-incrimination. Moreover, he admitted his priors during direct examination. Under the totality of the circumstances, we find defendant's admission of the prior allegation was voluntary and intelligent. (*Howard*, *supra*, 1 Cal.4th at p. 175.)

DISPOSITION

The judgment is affirmed.

RAYE, P. J.

We concur:

ROBIE, J.

DUARTE, J.